No. 249

In the

UNITED STATES SUPREME COURT

October Term, 1940

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v.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CITATION

CITATION—(Continued)

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

RECTOR & DAVIDSON, *Respondent*

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

On July 16, 1940, petition was filed on behalf of petitioner, praying that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on April 16, 1940.

The respondent opposes the petition for writ of certiorari for reasons hereinafter set out.

OPINION BELOW

The unpublished memorandum opinion of the Board of Tax Appeals is printed in the record at pages 38 to 47, inclusive.

The decision of the United States Board of Tax Appeals is printed in the record at pages 48 and 49.

The opinion of the United States Circuit Court of Appeals is reported in 111 F. (2d) 332.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 16, 1940. The jurisdiction of this Court is invoked under *Section 240 (a) of the Judicial Code*, as amended by the *Act of February 13, 1925*.

Notice of filing the petition herein, together with notice that no brief in support will be filed, copies of petition and transcript of record were served on counsel for respondent on July 20, 1940.

QUESTION PRESENTED

The question presented is as follows:

For the calendar years 1932, 1933 and 1934, was respondent an associate within the meaning of Section 1111 (a) (2) of the Revenue Act of 1932 and see 801 (a) (2) of Revenue Act of 1934, and as such subject to income tax as a corporation?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved are set forth in the Appendix, infra, pages 10-19.

STATEMENT

The statement of facts set out on pages 2 to 13, inclusive, of the petition herein is essentially correct.

The Court below in its opinion made a concise finding of fact.

SUMMARY OF ARGUMENT

I.

THE DECISION BELOW IS CORRECT.

II.

THE DECISION BELOW IS NOT IN CONFICT WITH ANY DECISION IN ANY OTHER CIRCUIT AND IT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

III.

THE QUESTION HERE PRESENTED REQUIRES THE APPLICATION OF PRINCIPLES AS DETERMINED BY DECISIONS OF THE COURTS TO THE FACTS IN EACH CASE TO BE CONSIDERED.

ARGUMENT

I.

The decision below is correct.

This Court has considered the association questions in *Hecht v. Malley, (44 S. Ct. 462, 265 U. S. 144); Morrissey v. Commissioner, (56 S. Ct. 289, 296 U. S. 344); Swanson v. Commissioner, (56 S. Ct. 283, 296 U. S. 362); Helvering v. Combs, (296 U. S. 365, 56 S. Ct. 287); Helvering v. Coleman-Gilbert Associates, (296 U. S. 369, 56 S. Ct. 285),* and has very definitely drawn the line of demarcation between associations, which due to their form of organization or methods of operation, are subject to tax as corporations and those which do not come within such scope.

Since all of these decisions have been rendered by this Court, it is not deemed necessary to quote its language at length.

The facts in the case under consideration are materially different.

(a) Rector & Davidson did not possess the attributes of a corporation.

(b) There is no continuity.

(c) There was personal liability.

(d) There were no shares or certificates of stated cash value issued.

(e) Rather, the interests sold were interests in realty as distinguished from personalty. Such interests were, in fact, interests in real estate, which under the laws of Texas, made the interest holders tenants in common.[1]

(f) By the instruments conveying the interests to the purchasers, Rector & Davidson were given power to act as attorney and agent of each joint owner. The use of such power in furthering the activities is not comparable to corporate activities.[2]

(g) The money derived from the saleo f undivided interests in the lease was used for its development, and not as a capital contribution as in the case of a corporation.

None of the characteristics of a corporation are, in any degree, similar to those of the respondent herein.

Rather, we have a relationship of principal and agent as discussed in the case of *A. A. Lewis & Company v. Commissioners, (57 S. Ct. 799).*

This case was decided subsequent to the *Morrissey case, supra,* and associated cases, and this Court differentiates between the salient facts in the case.

In this case, there was no trustee holding title for any one else, nor any form of legal entity.

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[1]Comm. v. Fleming, 82 F. (2d) 324, (C. C. A. 5th); McEntire v. Thomasson (Tex. Civ. App.), 210 S. W. 563.

[2]Comm. v. N. B.Whitcomb Coca-Cola Syndicate, 95 F. (2d) 596 (C. C. A. 5th) affg. 35 B. T. A. 1031.

Rather, it is the case where each interest holder was acting through his designated agent under power of attorney.

It is clear that the decision of the lower Court is correct.

II.

The decision below is not in conflict with any decision in any other circuit and it does not conflict with any decision of this Court.

It is contended that the decisions in the *Thrash Lease Trust case*, (*99 F. (2d) 925*), in which certiorari was denied, and in *Burk-Waggoner Oil Association v. Hopkins, (269 U. S. 110)*, are in direct conflict with the decision below in this case.

In the *Thrash Lease Trust case, supra*, the Board of Tax Appeals held that the petitioner had not presented facts sufficient to overcome the Commissioner's determination holding it to be an association.

It is contended in these and other cases cited by the petitioner that the facts are not similar to this case in that there was no resemblance to corporate activities, or separation of incident of ownership.

In the present case there was no legal entity separate and apart from the individual owner, but rather we have in the case under consideration individual ownership of interest in real estate acting through its agent.

This is directly comparable to the case of *N. B. Whitcomb Coca-Cola Syndicate, (95 F. (2d) 596)*, in which the Fifth Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals.

It is contended that there is no conflict with any Circuit Court decision or decision of this Court.

III.

The question here presented requires the application of principles as determined by decisions of the courts to the facts in each case to be considered.

It is contended that this Court has set forth in the *Morrissey case, supra*, the proposition that "due to the variety of circumstances under which it may arise, no inelastic rule can be advanced to settle the question, but that the facts of each case must control its determination."

In its decision, the lower Court follows the test as presented in the *Morrissey* case, supra, and determines from the facts whether or not the respondent herein more closely resembles a partnership than a corporation.

Such test was followed by this Court in the case of *A. A. Lewis & Company v. Commissioner*, supra, and by the United States Circuit Court of Appeals for the Fifth Circuit in the *N. B. Whitcomb Coca-Cola Syndicate* case, supra, and in the case of *Bert v. Helvering, (92 F. (2d) 491)*, in which the principles of this Court have been followed.

The petitioner herein questions the decision of the Court below in passing upon the facts found by the Board of Tax Appeals that the respondent is not an association taxable as a corporation.

The Ninth Circuit in *Winnett et al. v. Helvering, (C. C. A. 9th) (68 F. (2d) 614), held that the finding of the Board of Tax Appeals that the cost of moving a house from a lot in a business district to one in a residential district is a capital expenditure, is a finding of ultimate fact, sufficient in law to support the Board's conclusion that the cost was not deductible as a business expense. The Court refused to interfere with the decision of the Board.*

It is contended that each case must be decided upon its own facts, and that the Board of Tax Appeals' findings in this case that the respondent did not come within the scope of an association taxable as a corporation was correct.

It is contended by the respondent that the necessity for review as contended in the petition would not serve any useful purpose in the administration of the statutes. There may be many organizations in which the association question shows itself, but as clearly pointed out by this Court in the *Morrissey* case, supra, it is a question of fact to be determined as to whether or not the facts in any particular case and methods of operation in each particular case so closely resemble a corporation as to make it taxable as such.

CONCLUSION

Since this Court in its decisions has clearly settled the question involved, and since there is no conflict with any other Circuit, it is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

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August, 1940.